IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 625 of 2006
In
SPECIAL CIVIL APPLICATION No. 12231 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? Yes,

2 To be referred to the Reporter or not ? No.

3 Whether their Lordships wish to see the fair copy of the judgment ? No.

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? No.

5 Whether it is to be circulated to the civil judge ? No.

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ESSAR OIL LIMITED - Appellant(s)
Versus
UNITED INDIA INSURANCE COMPANY LTD & 2 - Respondent(s)

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Appearance :
NANAVATI ASSOCIATES for Appellant(s) : 1,
MR RAJNI H MEHTA for Respondent(s) : 1 - 2.
None for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA
Date : 28/04/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1.This appeal, filed under Clause 15 of the Letters Patent, is directed against judgment dated December 29,

2005 rendered by the learned Single Judge in Special Civil application No. 12231 of 2005 by which order dated February 10, 2005 passed by the learned Nominee of the Hon'ble Chief Justice in petition styled as “Petition under the Arbitration Act No. 32 of 2003” rejecting the prayer to refer the dispute for adjudication by the Arbitrator, is not interfered with, on the ground that the petition under Article 226 of the Constitution is not maintainable against an order passed by the learned Nominee of the Hon'ble Chief Justice in view of the Seven Judge Constitution Bench Judgment of the Supreme Court rendered in SBP Co. V. Patel Engineering Ltd. And Another, (2005) 8 Supreme Court Cases 618.

2. The appellant Company is engaged in setting up crude oil refinery. The respondent No.1 is an Insurance Company. In order to cover various risks associated with the refinery project, the appellant had availed of the insurance from the respondents. The respondents issued an Insurance Policy dated August 23, 1996. On June 9, 1998 a cyclone hit the coastal areas. The case of the appellant is that it suffered losses. The appellant claimed loss of Rs.886.30 crore under Section III of the

Insurance Policy. The appellant also claimed Rs.205.00 crore under Section I of the Insurance Policy for which the respondents paid Rs.30.00 crore. The respondents repudiated the claim of the appellant made under Section III of the the Policy by letter dated February 20, 2003. The case of the appellant is that Clause (7) of the Policy provides for reference to the Arbitrators to adjudicate the disputes between the parties. Therefore, by letter dated May 19, 2003 the appellant called upon the respondents to appoint its Arbitrator. The respondents failed to make appointment of the Arbitrator, and therefore, the appellant filed petition appeal under Section 11 of the Arbitration and Conciliation Act, 1996. The learned Nominee of the Hon'ble Chief Justice rejected the same by order dated February 10, 2005, holding as under :

> “However, in the present case, I do not suppose that the petition involves any contentious issue. The question is whether the Insurance company had admitted its liability to pay insurance money under the head “Advance Loss of Profits”. The above referred arbitration clause clearly stipulates that the said clause can be invoked only in case where the Insurance Company admits its liability to pay insurance money under the said head. At no point of time the Insurance Company had agreed or admitted

the said liability. In my view, therefore, the arbitration clause cannot be invoked. Besides, the petitioner Company has availed of the remedy before the Civil Court. Therefore also, the question of invoking arbitration clause shall not arise.

In view of the above discussion, the petition is dismissed. Notice is discharged”

3. Feeling aggrieved, the appellant invoked the extra ordinary jurisdiction of this Court under Article 226 of the Constitution by filing Special Civil Application No. 12231 of 2005. The learned Single Judge has refused to entertain the petition on the ground that in view of the decision in SBP & Co. (supra) the only remedy available to the appellant is to approach the Supreme Court under Article 136 of the Constitution and a petition under Article 226 of the Constitution is not maintainable, which has given rise to the instant appeal

4. This Court has heard Mr. K.S. Nanavati, learned Senior Counsel and Mr. Rajni H. Mehta learned counsel for Mr. V.K. Mishra, learned Advocate for the respondents at length and in great detail. This Court has also taken into consideration the documents forming part of the petition filed under the Arbitration and

Conciliation Act, 1996 as well as Special Civil application No. 12231 of 2005 and written submissions filed by the learned counsels for the parties before the learned Single Judge.

5. In SBP & Co. (supra) the point considered was “what is the nature of the function of the Chief Justice or his designate under Section 11 of the Arbitration and Conciliation Act, 1996.” On review of the law and decisions on the point, the 7 Judge Constitution Bench of the Supreme Court has held as under in para 47 of the reported decision :

“47, We, therefore, sum up our conclusions as follows :

(i)The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the

High Court or of the Supreme Court, the power that is exercised by the Nominee Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11 (8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(v) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of

the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in Konkan Rly. Corpn. Ltd. V. Rani Construction (P) Ltd. and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated

by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

(xii) The decision in Konkan Rly. Corpn. Ltd. V. Rani Construction (P) Ltd. is overruled.”

6. From what is authoritatively laid down by the Supreme Court in the abovequoted decision, it is evident that an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, and an appeal would lie against that order only under Article 136 of the Constitution to the Supreme Court. The Supreme Court has taken the view that a petition under Article 226 of the Constitution is not maintainable against order of the learned designate of Hon'ble the Chief Justice because according to the Supreme Court the expression “Chief Justice” is not in the sense of collectivity of Judges of the Supreme Court and the High Courts respectively. The contention that the learned Nominee of the Hon'ble Chief Justice had exercised the administrative power which is evident from the order passed by the learned Nominee while hearing

the petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, and therefore, the petition which was filed under Article 226 of the Constitution was maintainable, has no substance. While dealing with the submission advanced on behalf of the appellant that the petition filed under the Arbitration and Conciliation Act, 1996, involves determination of contentious issue which is required to be resolved by the arbitrator, the learned nominee has held that there cannot be any dispute that while exercising powers conferred by Section 11(6) of the Act, the Hon'ble the Chief Justice or his nominee is exercising administrative powers and contentious issues are not required to be gone into. However, this does not mean that the finding recorded by the learned Nominee that the arbitration clause could not have been invoked as the Insurance Company had not admitted the liability is a finding recorded in exercise of administrative powers. Whether a finding is recorded in exercise of administrative powers or judicial powers will have to be ascertained from the reach and impact of the finding concerned. The learned Nominee has recorded the finding that the appellant is not entitled to invoke arbitration clause because the Insurance Company has not admitted

its liability after appreciation of documents produced on the record of the case and having regard to its reach, ambit, scope and impact, it will have to be regarded as one recorded in exercise of judicial powers. The finding recorded by the learned Nominee that the arbitration clause is not invocable is a finding on merits and is recorded in exercise of judicial powers. The Supreme Court in SBP & Co. (supra) has explained that the Chief Justice or the designated Judge will have right inter-alia to decide whether a valid arbitration argument exists and this question in turn, would take in its sweep the question whether the arbitration clause is invocable. Under the circumstances, this Court is of the firm opinion that finding recorded by the learned Nominee that the appellant is not entitled to invoke arbitration clause because liability was never admitted by the Insurance Company is one which is arrived at in exercise of judicial powers. Once it is held that the learned designate of the Hon'ble Chief Justice had exercised judicial powers there is no manner of doubt that in terms of the principle laid down in SBP & Co. (Supra) the only remedy available to the appellant is to approach the Hon'ble Supreme Court under Article 136 of the Constitution of India. Therefore, this court is of

the opinion that Special Civil Application No.12231 of 2005 filed by the appellant under Article 226 of the Constitution of India challenging the order of the learned Nominee of the Hon'ble Chief Justice passed under Section 11 of the Arbitration and Conciliation Act, 1996 was not maintainable at all and the learned Single Judge was justified in dismissing the same as not maintainable.

7. Having regard to the facts of the case, this Court is of the opinion that as the petition under Article 226 of the Constitution of India was not maintainable against the decision rendered by the learned Nominee of the Hon'ble Chief Justice under Section 11 of the Act Arbitration and Conciliation Act, 1996, the instant appeal is also not maintainable and is liable to be dismissed.

8. On over all view of the matter, this Court is satisfied that no case is made out by the learned counsel for the appellant to interfere with the judgment of the learned Single Judge in the instant appeal, and therefore, the appeal which lacks merits, is liable to be dismissed.

9. For the foregoing reasons, the appeal fails and is dismissed. There shall be no order as to costs.

(J.M. Panchal, J.)

(Bankim N. Mehta, J.)

/JVSatwara/